

Jan 21, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NATHAN S.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:19-cv-03144-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 7. The Court, having reviewed the administrative record and the parties' briefing,
2 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
3 motion, ECF No. 15, and grants Defendant's motion, ECF No. 16.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

6 **STANDARD OF REVIEW**

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
16 "of such severity that he is not only unable to do his previous work[,] but cannot,
17 considering his age, education, and work experience, engage in any other kind of
18 substantial gainful work which exists in the national economy." 42 U.S.C. §
19 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
3 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
4 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial
5 gainful activity," the Commissioner must find that the claimant is not disabled. 20
6 C.F.R. § 416.920(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
10 "any impairment or combination of impairments which significantly limits [his or
11 her] physical or mental ability to do basic work activities," the analysis proceeds to
12 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
13 this severity threshold, however, the Commissioner must find that the claimant is
14 not disabled. 20 C.F.R. § 416.920(c).

15 At step three, the Commissioner compares the claimant's impairment to
16 severe impairments recognized by the Commissioner to be so severe as to preclude
17 a person from engaging in substantial gainful activity. 20 C.F.R. §
18 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in
9 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
10 capable of performing past relevant work, the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
12 performing such work, the analysis proceeds to step five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
16 must also consider vocational factors such as the claimant's age, education and
17 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
18 adjusting to other work, the Commissioner must find that the claimant is not
19 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
20

1 other work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
8 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 On June 25, 2015, Plaintiff applied for Title XVI supplemental security
11 income benefits alleging a disability onset date of June 14, 2013. Tr. 67, 169-74.
12 The application was denied initially, and on reconsideration. Tr. 95-103; Tr. 108-
13 14. Plaintiff appeared before an administrative law judge (ALJ) on August 24,
14 2017. Tr. 34-66. On June 11, 2018, the ALJ denied Plaintiff’s claim. Tr. 12-29.

15 At step one of the sequential evaluation process, the ALJ found Plaintiff has
16 not engaged in substantial gainful activity since June 25, 2015. Tr. 16. At step
17 two, the ALJ found that Plaintiff has the following severe impairments: anxiety
18 disorder, migraine, and left knee impairment. *Id.*

19 At step three, the ALJ found Plaintiff does not have an impairment or
20 combination of impairments that meets or medically equals the severity of a listed

1 impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform
2 light work with the following limitations:

3 [Plaintiff can] occasionally climb ladders, ropes, or stairs;
4 occasionally stoop, kneel, crouch, and crawl; avoid concentrated
5 exposure to extreme cold, extreme heat, excessive vibration and
6 workplace hazards such as dangerous machinery and unprotected
7 heights; and should not work in an environment with very loud noises
8 equivalent to a gun shot or where explosion is a normal part of the
9 work environment. Additionally, [Plaintiff] can perform simple
10 routine tasks in a simple routine environment involving simple work-
11 related decisions. He can have superficial interaction with co-workers
12 and occasional superficial interaction with the general public,
13 including the abilities to give and receive directions, accept
14 instructions, participate in training, ask routine work-related
15 questions, and can accept direction from a supervisor, but should not
16 be required to be involved in extensive team-work, problem-solving,
17 or responsible for any intense communication with members of the
18 public such as clients, etc.

11 Tr. 20.

12 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 24. At
13 step five, the ALJ found that, considering Plaintiff's age, education, work
14 experience, RFC, and testimony from the vocational expert, there were jobs that
15 existed in significant numbers in the national economy that Plaintiff could perform,
16 such as marker, small products assembler, and inspector/hand packager. Tr. 25.
17 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
18 Social Security Act, from the date of the application through the date of the
19 decision. *Id.*

1 On May 7, 2019, the Appeals Council denied review of the ALJ's decision,
2 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
3 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him supplemental security income benefits under Title XVI of the Social Security
7 Act. Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 9 2. Whether the ALJ properly evaluated the medical opinion evidence; and
- 10 3. Whether the ALJ fully and fairly developed the record.

11 ECF No. 15 at 2.

12 DISCUSSION

13 A. Plaintiff's Symptom Claims

14 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in
15 discrediting his symptom claims. ECF No. 15 at 3-13. An ALJ engages in a two-
16 step analysis to determine whether to discount a claimant's testimony regarding
17 subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must
18 determine whether there is objective medical evidence of an underlying
19 impairment which could reasonably be expected to produce the pain or other
20 symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The

1 claimant is not required to show that [the claimant's] impairment could reasonably
2 be expected to cause the severity of the symptom [the claimant] has alleged; [the
3 claimant] need only show that it could reasonably have caused some degree of the
4 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

5 Second, “[i]f the claimant meets the first test and there is no evidence of
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
9 omitted). General findings are insufficient; rather, the ALJ must identify what
10 symptom claims are being discounted and what evidence undermines these claims.
11 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
12 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
13 explain why it discounted claimant’s symptom claims)). “The clear and
14 convincing [evidence] standard is the most demanding required in Social Security
15 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
16 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 Factors to be considered in evaluating the intensity, persistence, and limiting
18 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
19 duration, frequency, and intensity of pain or other symptoms; 3) factors that
20 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and

1 side effects of any medication an individual takes or has taken to alleviate pain or
2 other symptoms; 5) treatment, other than medication, an individual receives or has
3 received for relief of pain or other symptoms; 6) any measures other than treatment
4 an individual uses or has used to relieve pain or other symptoms; and 7) any other
5 factors concerning an individual's functional limitations and restrictions due to
6 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
7 416.929 (c). The ALJ is instructed to "consider all of the evidence in an
8 individual's record," "to determine how symptoms limit ability to perform work-
9 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

10 The ALJ found that Plaintiff's medically determinable impairments could
11 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
12 statements concerning the intensity, persistence, and limiting effects of his
13 symptoms were not entirely consistent with the evidence. Tr. 21.

14 First, the ALJ found Plaintiff's claims of disabling migraines, knee pain, and
15 mental health symptoms inconsistent with the longitudinal record, which
16 demonstrates a lack of treatment and minimal symptoms. Tr. 21-22. An ALJ may
17 not discredit a claimant's pain testimony and deny benefits solely because the
18 degree of pain alleged is not supported by objective medical evidence. *Rollins v.*
19 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,
20 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). Medical

evidence is a relevant factor, however, in determining the severity of a claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929I(2). Minimal objective evidence is a factor which may be relied upon in discrediting a claimant's testimony, although it may not be the only factor. *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

The ALJ reasoned that the longitudinal record did not support Plaintiff's allegations of disabling physical and mental health symptoms. Tr. 21. Regarding his physical symptoms, Plaintiff did not seek treatment for his physical symptoms related to the gunshot wounds after his initial hospital visit. *Id.* A CT scan showed no acute brain abnormality. *Id.* (citing Tr. 277-78). Plaintiff's physical consultative examination demonstrated generally normal findings. Tr. 21 (citing Tr. 352-54). Although Plaintiff alleges limitations due to a knee impairment, including an inability to put pressure on his knee, Tr. 47, he did not seek treatment for the knee symptoms and his gait, knee strength and range of motion were normal at the consultative examination, though he had some tenderness. Tr. 21-23, 351-53. While Plaintiff alleges pain severe enough to cause him to drop to the floor, and flashbacks that cause physical symptoms multiple times a day, including nausea, headaches and minor light sensitivity, Tr. 349, after the initial hospital visit, there are no visits for headaches, pain, or nausea. The ALJ reasonably

1 concluded that the medical evidence does not support the severity of physical
2 limitation alleged by Plaintiff.

3 Regarding his mental health symptoms, Plaintiff alleges difficulty with
4 concentration, memory and task completion, however, his mental consultative
5 examination demonstrated normal concentration, memory, persistence, social
6 interaction and attention. Tr. 23 (citing Tr. 339-46). Plaintiff's full-scale IQ is 94
7 and his scores on the memory subtests placed him in the thirty-fourth to fifty-fifth
8 percentile. Tr. 343-44. Plaintiff also had gaps in his mental health treatment, and
9 the records from the periods he did receive treatment contained generally normal
10 findings. Tr. 23 (citing Tr. 308, 332, 336). The ALJ reasonably concluded that the
11 medical evidence does not support the severity of the mental limitations alleged by
12 Plaintiff.

13 Plaintiff argues the ALJ's analysis was not sufficiently specific and that the
14 records demonstrate abnormalities that support Plaintiff's allegations. ECF No. 15
15 at 11-12. While the ALJ's cited records show some minor abnormalities like mild
16 irritability/anxiety, mildly impaired attention/concentration at some appointments,
17 and constricted affect, Tr. 308, 332, 336, they also demonstrate generally normal
18 thoughts, speech, memory, attention, concentration and cognitive functioning, Tr.
19 308, 332, 336. Plaintiff cites to other records demonstrating some abnormalities.
20 ECF No. 15 at 12 (citing, e.g., Tr. 284 (mildly disheveled, depressed/anxious

1 mood, constricted affect, poor attention/concentration, partial insight, but good eye
2 contact, average intelligence, good memory); Tr. 295 (mildly anxious, constricted
3 affect, but otherwise normal exam); Tr. 302 (mildly irritable and anxious, but
4 otherwise normal exam); Tr. 308 (mildly irritable, constricted affect, but otherwise
5 normal exam); Tr. 312 (anxious, reports problems sleeping); Tr. 334 (dysthymic,
6 irritable mood), Tr. 336 (mildly impaired concentration, mildly anxious,
7 constricted affect, otherwise normal exam); Tr. 338 (somewhat agitated and
8 anxious); Tr. 351 (some emotional distress, a bit anxious, makes very little eye
9 contact, otherwise normal exam)). Though Plaintiff points to records generally
10 showing mild abnormalities, the ALJ's interpretation of the evidence is reasonable
11 and will not be disturbed. *See Rollins*, 261 F.3d at 857. The ALJ reasonably
12 concluded that the longitudinal record is inconsistent with Plaintiff's reports of
13 disabling physical and mental health symptoms. This finding is supported by
14 substantial evidence.

15 Second, the ALJ found Plaintiff's activities inconsistent with his allegations
16 of significantly impaired social functioning. Tr. 23. The ALJ may consider a
17 claimant's activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857.
18 If a claimant can spend a substantial part of the day engaged in pursuits involving
19 the performance of exertional or non-exertional functions, the ALJ may find these
20 activities inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at

1 603; *Molina*, 674 F.3d at 1113. “While a claimant need not vegetate in a dark
2 room in order to be eligible for benefits, the ALJ may discount a claimant’s
3 symptom claims when the claimant reports participation in everyday activities
4 indicating capacities that are transferable to a work setting” or when activities
5 “contradict claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1112-
6 13.

7 The ALJ reasoned Plaintiff’s ability to travel to Leavenworth, maintain
8 relationships with two medical providers and his girlfriend, socialize with his
9 girlfriend’s parents and care for his child demonstrated an ability to engage in
10 some social interactions, which were inconsistent with his allegations of significant
11 social barriers. Tr. 23. The records demonstrate Plaintiff has had some difficulties
12 in maintaining relationships. He reported he and his girlfriend had been “off and
13 on” and she had fallen in love with one of his friends. Tr. 340-41. Additionally,
14 he has not maintained a relationship with any of his own family members and he
15 previously got in a fight with a staff at Union Gospel Mission. Tr. 341. He also
16 reported he is close with his girlfriends’ parents. *Id.* Plaintiff shops one to two
17 times per week, goes out to eat and enjoys spending time with his friends, though
18 he reported difficulty being around too many people. Tr. 202-03. He reported
19 getting along well with authority figures, unless he is asked something he does not
20 know the answer to, which causes him to be flustered. Tr. 205. He reported

1 previously getting terminated due to tardiness and having an issue with a coworker.
2 *Id.* Though the record demonstrates some social difficulties, the ALJ reasonably
3 concluded that Plaintiff's activities are inconsistent with Plaintiff's reported severe
4 limitation in social activities. This finding is supported by substantial evidence and
5 was a clear and convincing reason to discount Plaintiff's symptoms complaints.

6 Third, the ALJ found Plaintiff's gaps in treatment inconsistent with his
7 allegations of disabling symptoms. Tr. 23. An unexplained, or inadequately
8 explained, failure to seek treatment or follow a prescribed course of treatment may
9 be considered when evaluating the claimant's subjective symptoms. *Orn v. Astrue*,
10 495 F.3d 625, 638 (9th Cir. 2007). And evidence of a claimant's self-limitation
11 and lack of motivation to seek treatment are appropriate considerations in
12 determining the credibility of a claimant's subjective symptom reports. *Osenbrock*
13 *v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F.
14 App'x 45, *3 (9th Cir. 2009) (unpublished opinion) (considering why plaintiff was
15 not seeking treatment). Social Security Ruling (SSR) 16-3p instructs that an ALJ
16 "will not find an individual's symptoms inconsistent with the evidence in the
17 record on this basis without considering possible reasons he or she may not comply
18 with treatment or seek treatment consistent with the degree of his or her
19 complaints." SSR 16-3p at *8 (March 16, 2016), *available at* 2016 WL 1119029.
20

1 The ALJ reasoned that Plaintiff had insurance, with no co-pay for
2 appointments, but did not seek any physical care after his initial hospital visit. Tr.
3 23. Plaintiff sought mental health treatment in 2015 but had a gap in treatment
4 from the end of 2015 through April 2016 and stopped treatment in 2017. *Id.*
5 Plaintiff reported he had difficulty accessing transportation in 2017 but the ALJ
6 considered that Plaintiff did not explain why he did not look for care closer to
7 home. *Id.*

8 Plaintiff argues the ALJ failed to consider Plaintiff's other reasons for not
9 seeking additional care, such as because he was previously prescribed narcotic pain
10 medications for his knee, which he did not want to take due to fear of addiction,
11 *Id.* at 4 (citing Tr. 49-50, 52-53); because he had intolerable side effects from prior
12 medications, ECF No. 15 at 5 (citing Tr. 50-51); his religious beliefs prevent him
13 from taking strong pain medications, ECF No. 15 at 5 (citing Tr. 50); and he did
14 not undergo additional treatment for his gunshot wound because the treatment was
15 elective, and he would have to pay for the treatment out of pocket, ECF No. 15 at 5
16 (citing Tr. 40-41, 52). ECF No. 15 at 4-7. He further contends he was unable to
17 access mental health care due to transportation issues, and ; his mental health
18 treatment had been ineffective; and he did not seek treatment during the gap in
19 2016 because he had temporarily relocated. ECF No. 15 at 6-7. (citing Tr. 378-
20 79).

1 While Plaintiff offers several reasons for not taking narcotic pain
2 medications, he does not offer any explanation as to why he did not pursue any
3 other forms of treatment for his knee such as physical therapy or trials of non-
4 narcotic medications. There is no evidence Plaintiff sought any treatment for his
5 reported migraines. While Plaintiff reports difficulties continuing mental health
6 treatment due to a temporary move and then transportation difficulties getting to
7 his counselor's location, Plaintiff offers no explanation as to why he did not seek
8 any mental health care where he temporarily lived, nor if he sought other care once
9 he began having transportation difficulties. There is no evidence Plaintiff sought
10 other counseling or a prescriber for mental health medications.

11 On this record, the ALJ reasonably concluded that the longitudinal record,
12 Plaintiff's activities of daily living, and Plaintiff's failure to seek treatment and
13 gaps in treatment are inconsistent with Plaintiff's symptom claims. These are clear
14 and convincing reasons, supported by substantial evidence, to discount Plaintiff's
15 symptoms complaints.

1 **B. Medical Opinion Evidence**

2 Plaintiff contends the ALJ improperly considered the opinions of Neil
3 Anderson, LICSW, Mary Pellicer, M.D., and Guillermo Rubio, M.D. ECF No. 15
4 at 13-19.

5 There are three types of physicians: “(1) those who treat the claimant
6 (treating physicians); (2) those who examine but do not treat the claimant
7 (examining physicians); and (3) those who neither examine nor treat the claimant
8 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
10 Generally, a treating physician’s opinion carries more weight than an examining
11 physician’s, and an examining physician’s opinion carries more weight than a
12 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
13 to opinions that are explained than to those that are not, and to the opinions of
14 specialists concerning matters relating to their specialty over that of
15 nonspecialists.” *Id.* (citations omitted).

16 If a treating or examining physician’s opinion is uncontradicted, the ALJ
17 may reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
19 “However, the ALJ need not accept the opinion of any physician, including a
20 treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
6 31). The opinion of a nonexamining physician may serve as substantial evidence if
7 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
8 53 F.3d 1035, 1041 (9th Cir. 1995).

9 “Only physicians and certain other qualified specialists are considered
10 ‘[a]cceptable medical sources.’” *Ghanim*, 763 F.3d at 1161 (alteration in original);
11 *see* 20 C.F.R. § 416.913 (2013). However, an ALJ is required to consider evidence
12 from non-acceptable medical sources, such as therapists. 20 C.F.R. § 416.913(d).³
13 An ALJ may reject the opinion of a non-acceptable medical source by giving
14 reasons germane to the opinion. *Ghanim*, 763 F.3d at 1161.

15
16
17
18 ³ The regulation that requires an ALJ’s consider opinions from non-acceptable
19 medical sources is found at 20 C.F.R. § 416.927(f) for claims filed after March 27,
20 2017. The Court applies the regulation in effect at the time of Plaintiff’s filing.

1 *1. Mr. Anderson*

2 Mr. Anderson, a treating counselor, provided an opinion on Plaintiff's
3 functioning on June 29, 2015. Tr. 279-81. Mr. Anderson opined Plaintiff has mild
4 limitations in the ability to: remember locations and work-like procedures;
5 understand/remember very short and simple instructions; carry out very short and
6 simple instructions; make simple work-related decisions; and maintain socially
7 appropriate behavior and adhere to standards of cleanliness; moderate limitations
8 in the ability to understand and remember detailed instructions; carry out detailed
9 instructions; maintain an ordinary routine without special supervision; interact
10 appropriately with the public; and ask simple questions or request assistance; and
11 marked limitations in the ability to maintain attention and concentration for
12 extended periods; perform activities within a schedule, maintain regular attendance
13 and be punctual within customary tolerances; work in coordination with or
14 proximity to others without being distracted by them; complete a normal
15 workday/workweek without interruptions from symptoms and perform at a
16 consistent pace without an unreasonable number/length of rest periods; accept
17 instructions and respond appropriately to criticism; get along with coworkers
18 without distracting them or exhibiting behavioral extremes; respond appropriately

1 to changes in the work setting; travel to unfamiliar places or use public
2 transportation; and set realistic goals or make plans independently. *Id.*

3 Mr. Anderson also opined Plaintiff had mild/moderate limitations in his
4 activities of daily living, moderate limitations in social functioning and marked
5 limitations in maintaining concentration, persistence or pace. Tr. 281.
6 Additionally, he opined Plaintiff would be off task 21 to 30 percent of the time and
7 would miss four or more days per month if he were to work full-time. *Id.* Mr.
8 Anderson opined Plaintiff has such marginal adjustment that even a minimal
9 increase in mental demands or changes in the environment would be predicted to
10 cause Plaintiff to decompensate. *Id.*

11 The ALJ “did not adopt” Mr. Anderson’s opinion but did not indicate the
12 amount of weight given to the opinion. Tr. 22, 24. As Mr. Anderson is not an
13 acceptable medical source, the ALJ was required to give germane reasons to reject
14 the opinion. *See Ghanim*, 763 F.3d at 1161.

15 First, the ALJ found Mr. Anderson’s opinion consisted of checked boxes
16 indicating Plaintiff has limitations in virtually all areas without explanation for the
17 “extreme limitations.” Tr. 22. The Social Security regulations “give more weight
18 to opinions that are explained than to those that are not.” *Holohan*, 246 F.3d at
19 1202. However, the fact that an opinion was provide in a check-box form alone
20 does not provide a germane reason to reject the opinion. *Popa v. Berryhill*, 872

1 F.3d 901 (9th Cir. 2017). Further, it is not a proper basis to reject an opinion that
2 is supported by treatment notes. *See Garrison*, 759 F.3d at 1014 n. 17.

3 Here, Mr. Anderson’s opinion contains only checked boxes, without any
4 explanations. Tr. 279-81. The treatment notes from Plaintiff’s sessions with Mr.
5 Anderson prior to the date of the opinion demonstrate Plaintiff had some anxiety,
6 increases in agitation and he initially reported “great difficulty sleeping” but he
7 later reported feeling “a bit better” and improved sleep. Tr. 310-12, 317. The
8 records pre-dating the opinion do not contain any mental status examinations,
9 testing or notes regarding Plaintiff’s memory, concentration, social functioning, or
10 other areas of functioning addressed in the opinion. While Plaintiff argues Mr.
11 Anderson’s treatment notes post-dating the opinion provide support for the
12 opinion, such records do not provide support for Mr. Anderson’s opinion at the
13 time he rendered it. *See* ECF No. 15 at 16-17. As Mr. Anderson’s opinion lacked
14 explanations, this was a germane reason to reject Mr. Anderson’s opinion.

15 Second, the ALJ reasoned Mr. Anderson had treated Plaintiff for a limited
16 time when he rendered his opinion. Tr. 22, 24. The number of visits a claimant
17 had with a particular provider is a relevant factor in assigning weight to an opinion.
18 20 C.F.R. § 416.927(c). The regulations direct that all opinions, including the
19 opinions of examining providers, should be considered. 20 C.F.R. § 416.927(b),
20 (c). At the time he rendered the opinion, Mr. Anderson had treated Plaintiff for

1 five weeks and had seen him on four occasions. Tr. 310-12, 317. The ALJ's
2 reasoning that the opinion should be afforded less weight as the provider treated
3 Plaintiff for a short period before rendering the opinion is inconsistent with the
4 ALJ affording substantial weight to the opinion of Dr. Guillermo Rubio, a non-
5 examining source, and affording some weight to Dr. Mary Pellicer, who examined
6 Plaintiff on only one occasion. Tr. 22, 24. This was not a germane reason to reject
7 the opinion. However, as the ALJ gave a germane reason to reject the opinion, this
8 error is harmless. *See Molina*, 674 F.3d at 1115.

9 Third, the ALJ found Plaintiff had not yet started psychotropic medication at
10 the time of Mr. Anderson's opinion. Tr. 24. An ALJ may discredit opinions that
11 are unsupported by the record as a whole. *Batson*, 359 F.3d at 1195; *Warre v.*
12 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (determining
13 that conditions effectively controlled with medication are not disabling for
14 purposes of determining eligibility for benefits); *Tommasetti v. Astrue*, 533 F.3d
15 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response to treatment can
16 undermine a claimant's complaints of debilitating pain or other severe limitations).
17 Mr. Anderson's records indicate Plaintiff had not yet begun taking medication
18 through the date of the June 2015 opinion. Tr. 311-12. Plaintiff then tried
19 mirtazapine, followed with taking Seroquel and then venlafaxine and prazosin. Tr.
20 304, 307, 309. Plaintiff reported improvement in his symptoms with medication.

Tr. 295, 299. Plaintiff also reported improvement with eye movement desensitization and reprogramming (EMDR) sessions and Mr. Anderson noted Plaintiff was making slow progress. Tr. 299, 305, 307. In September 2015, Plaintiff reported prazosin was very helpful in treating his anxiety, and he was observed as having normal memory, attention, concentration, and speech, with mildly anxious mood and constricted affect. Tr. 295-96. While the records demonstrate Plaintiff experienced some side effects from medications, and he reported ongoing symptoms even with treatment, Tr. 295, the record overall shows Plaintiff experienced some improvement with treatment after Mr. Anderson's opinion. As such, the ALJ gave germane reasons to reject Mr. Anderson's opinion.

While Plaintiff argues the ALJ's decision is not supported by the medical opinion evidence, and the ALJ had a duty to further develop the record, this argument is not supported by the evidence, as discussed further *infra*. ECF No. 15 at 14-17. The ALJ considered the opinions of Mr. Anderson and the psychological consultants and relied on Plaintiff's records. Tr. 19, 21-24. There is no ambiguous evidence nor did the ALJ find the record is inadequate to allow for proper evaluation of the evidence; as such, the ALJ's duty to develop the record was not triggered. See *Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)).

1 2. *Dr. Pellicer and Dr. Rubio*

2 Dr. Mary Pellicer performed a consultative examination and diagnosed
3 Plaintiff with chronic headache pain, bipolar, PTSD, ADD, OCD and chronic left
4 knee pain. Tr. 347-54. Dr. Pellicer opined Plaintiff can stand and walk for at least
5 six hours, and can sit for six hours in a day, with “more frequent” breaks due to
6 knee pain. Tr. 353. She opined Plaintiff can lift and carry 20 pounds occasionally
7 and 10 pounds frequently, and he can bend, squat, crawl and kneel occasionally.
8 Tr. 354. Dr. Pellicer opined Plaintiff does not need an assistive device and does
9 not have any postural or manipulative limitations. *Id.*

10 Dr. Rubio, a non-examining source, opined Plaintiff can stand and walk six
11 hours in a day and can sit for six hours. Tr. 89. He opined Plaintiff can lift and
12 carry 20 pounds occasionally and 10 pounds frequently, can occasionally climb
13 ladders/ropes/scaffolds, kneel, crouch and crawl, and should avoid concentrated
14 exposure to noise, vibration and hazards. Tr. 89-90.

15 The ALJ gave Dr. Rubio’s opinion significant weight, Tr. 23, and gave some
16 weight to Dr. Pellicer’s opinion, Tr. 22. The ALJ rejected Dr. Pellicer’s opinion
17 that Plaintiff would need extra breaks due to his knee impairment, instead
18 concurring with Dr. Rubio that Plaintiff does not need additional breaks. *Id.*
19 Generally, an ALJ should accord more weight to the opinion of an examining
20 physician than to that of a non-examining physician. *See Andrews*, 53 F.3d at

1 1040-41. However, the opinion of a nonexamining physician may serve as
2 substantial evidence if it is “supported by other evidence in the record and [is]
3 consistent with it.” *Id.* at 1041.

4 First, the ALJ found Dr. Pellicer’s opinion that Plaintiff would need extra
5 breaks due to knee pain is inconsistent with the record. Tr. 22. Relevant factors
6 when evaluating a medical opinion include the amount of relevant evidence that
7 supports the opinion and the consistency of the medical opinion with the record as
8 a whole. *Lingenfelter v. Astrue*, 504 F.3d a1028, 1042 (9th Cir. 2007); *Orn*, 495
9 F.3d at 631. The ALJ reasoned that the record demonstrates there is no medical
10 evidence of Plaintiff’s knee impairment outside of Dr. Pellicer’s examination. Tr.
11 22. None of the medical records mention a knee impairment or knee symptoms
12 outside of Dr. Pellicer’s examination. Plaintiff also previously reported no
13 difficulties with lifting, squatting, bending, standing, walking, or kneeling. Tr.
14 204. Dr. Rubio’s opinion that Plaintiff is capable of light work, without the need
15 for extra breaks, is more consistent with the evidence.

16 Second, the ALJ found Dr. Pellicer’s opinion inconsistent with Plaintiff’s
17 lack of care for his alleged knee impairment. Tr. 22. An ALJ may discredit a
18 claimant’s symptom complaints if the claimant fails to show good reason for
19 failing to follow treatment recommendations. *Smolen*, 80 F.3d at 1284. However,
20 the fact that a claimant fails to pursue treatment is not directly relevant to the

1 weight of a medical provider's opinion. *See* 20 C.F.R. § 416.927(c). The lack of
2 treatment may be considered as a part of the opinion's consistency with the record
3 as a whole. *See Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631.

4 While Plaintiff argues he did not seek treatment for his knee because he
5 previously was only offered narcotic pain medication, which he would not take due
6 to risk of addiction, there is no evidence Plaintiff sought any treatment for his knee
7 during the relevant adjudicative period. ECF No. 15 at 4. There is also no
8 evidence Plaintiff complained of knee symptoms or limitations due to his knee
9 during the relevant period. Plaintiff reported being able to walk five miles before
10 needing a five-minute break and having no physical limitations. Tr. 204. As such,
11 the record demonstrates a lack of any reported symptoms, outside of Dr. Pellicer's
12 examination, and a lack of seeking any treatment for his knee. This evidence is
13 consistent with Dr. Rubio's opinion. Dr. Rubio's opinion is supported by other
14 evidence, and is consistent with the record, thus it amounted to substantial
15 evidence to support the ALJ's rejection of Dr. Pellicer's opinion.

16 Plaintiff contends Dr. Rubio improperly gave Dr. Pellicer's opinion great
17 weight, without an explanation for rejecting the need for extra breaks, and the
18 ALJ's reliance on Dr. Rubio's opinion was thus an error. ECF No. 15 at 18-19.
19 However, any error in rejecting Dr. Pellicer's opinion would be harmless. Plaintiff
20 argues the rejection would be harmful because Dr. Pellicer opined Plaintiff needs

1 additional breaks, which is disabling according to the vocational expert. ECF No.
2 15 at 18 (citing Tr. 63). Plaintiff's citation does not contain any reference to
3 additional breaks. The vocational expert testified that if an individual needed two
4 unscheduled twenty-minute breaks per day, they would not be competitively
5 employable. Tr. 62. The expert also testified that an individual who would be off-
6 task fifteen percent of the day or would miss at least one and a half days per month
7 would not be competitively employable. Tr. 61.

8 Dr. Pellicer opined Plaintiff would need more frequent breaks but did not
9 quantify the amount of time Plaintiff would be off-task or would miss work due to
10 the extra breaks. Tr. 353. She opined Plaintiff can stand and walk for six hours,
11 and can sit for six hours, in an eight-hour workday, indicating Plaintiff can work a
12 full workday. *Id.* There is no indication that the need for more frequent breaks
13 would rise to the level of being off-task fifteen percent of the day, missing one and
14 a half days or more per month, or having two unscheduled twenty-minute breaks
15 per day. As such, any error in rejecting Dr. Pellicer's opinion would be harmless.
16 *See Molina*, 674 F.3d at 1111.

17 **C. ALJ's Duty to Develop the Record**

18 Plaintiff contends the ALJ erred by failing to fully and fairly develop the
19 record. ECF No. 15 at 19-21. The ALJ has an independent duty to fully and fairly
20 develop a record in order to make a fair determination as to disability, even where,

1 as here, the claimant is represented by counsel. *Celaya v. Halter*, 332 F.3d 1177,
2 1183 (9th Cir. 2003); *see also Tonapetyan*, 242 F.3d at 1150; *Crane v. Shalala*, 76
3 F.3d 251, 255 (9th Cir. 1996). “Ambiguous evidence, or the ALJ’s own finding
4 that the record is inadequate to allow for proper evaluation of the evidence, triggers
5 the ALJ’s duty to ‘conduct an appropriate inquiry.’” *See Tonapetyan*, 242 F.3d at
6 1150 (quoting *Smolen*, 80 F.3d at 1288).

7 First, Plaintiff asserts the ALJ had a duty to develop the record, because she
8 did not fully rely on the opinion evidence in preparing the RFC. ECF No. 15 at 20.
9 It is the ALJ’s responsibility to resolve conflicts in the medical evidence and to
10 determine the RFC based on the evidence. *See Andrews*, 53 F.3d at 1039; 20
11 C.F.R. § 416.946(c). Plaintiff concedes the ALJ is not required to rely on an
12 opinion in forming the RFC but argues the ALJ’s decision was not supported by
13 substantial evidence due to the rejection of the opinions. ECF No. 17 at 10. While
14 the ALJ did not fully rely on the opinions, the ALJ’s opinion is supported by
15 substantial evidence. The opinions in the file opine Plaintiff does not have any
16 psychological limitations. Tr. 73-74, 86-87, 345. The ALJ considered the
17 opinions but found the later submitted evidence supported some mental limitations
18 based on the combination of psychological symptoms and pain. Tr. 22.

19 The ALJ considered the psychological consultative examination, which
20 demonstrated Plaintiff had an average IQ and found he had an average ability to

1 understand, concentrate, persist, interact socially and adapt. Tr. 18, 20 (citing Tr.
2 341-45). The ALJ considered Plaintiff's activities, including his ability to maintain
3 therapeutic relationships, a romantic relationship, and relationships with his
4 girlfriends' parents. Tr. 23. The ALJ also considered Plaintiff's records, showing
5 Plaintiff had generally normal mental clinical findings. Tr. 23 (citing Tr. 308, 314,
6 332, 336). The ALJ's decision was supported by substantial evidence and thus the
7 ALJ's duty to develop the record was not triggered by an insufficient record.

8 Second, Plaintiff further contends the ALJ had a duty to develop the record
9 because the opinions were inconsistent. ECF No. 15 at 20-21. Plaintiff does not
10 cite to any authority to support such argument. Inconsistent opinions may trigger
11 the duty to develop the record, but the adjudicator first looks at the relevant
12 evidence to determine if a decision can be made based on the current evidence. 20
13 C.F.R. § 416.920b. Here, there was sufficient evidence for the ALJ to make a
14 determination, thus the inconsistent opinions did not trigger a duty to develop the
15 record.

16 Third, Plaintiff asserts the ALJ had a duty to develop the record because Mr.
17 Anderson's opinion was "under-explained." ECF No. 15 at 17. However, the ALJ
18 considered Mr. Anderson's opinion and the records from that time period and did
19 not find the evidence warranted further development of the record. Tr. 22, 24. Mr.
20

1 Anderson's lack of explanation for his opinion did not trigger a duty to develop the
2 record. Thus, Plaintiff is not entitled to remand on these grounds.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. The District Court Executive is directed to substitute Andrew M. Saul as
8 the Defendant and update the docket sheet.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

10 3. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
11 **GRANTED**.

12 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED January 21, 2020.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20